

**Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, DC 20554**

In the Matter of	)	
	)	
Accelerating Wireless Broadband	)	WT Docket No. 17-79
Deployment by Removing Barriers	)	
to Infrastructure Investment	)	
	)	
	)	
Revising the Historic Preservation	)	WT Docket No. 15-180
Review Process for Small Facility	)	
Deployments	)	

**COMMENTS OF THE NEZ PERCE TRIBE**

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April 11, 2017

The Nez Perce Tribe (Tribe) is located in north-central Idaho with ancestral territory in Idaho, Montana, Oregon, and Washington. The Tribe has occupied this 15 million acre homeland from time immemorial and is recognized by the United States as a sovereign nation in the *Treaty with the Nez Perces*, June 11, 1855, 12 Stat. 957. The Tribe works with a variety of federal, state, and local agencies on small and large projects in the compliance with federal, state, and local laws, including but not limited to, the National Historic Preservation Act (NHPA), the National Environmental Policy Act (NEPA), and the Native American Graves Protection and Repatriation Act (NAGPRA). The Tribe protects irreplaceable sites and locations that are of religious and cultural significance to our people today by continuing the successful collaborative processes that have been established with federal agencies, other Indian tribes, and project developers.

The Federal Communications Commission (FCC) claims that wireless broadband needs and 5G deployment create “an urgent need to remove any unnecessary barriers to such deployment, whether caused by Federal law, Commission processes, local and State reviews, or otherwise.”<sup>1</sup> The FCC seems to assert that the wireless industry has an inherent right to deploy equipment and facilities wherever they desire and without regard to existing environmental or cultural compliance laws and regulations.

The Tribe is pleased that the FCC acknowledges that the proposed changes “might significantly or uniquely affect Tribal governments, their land and resources.”<sup>2</sup> Impacts to Tribal resources include ancestral archaeological sites, sacred sites, and traditional cultural properties. The FCC has a trust responsibility to the Tribe to identify these resources and to consider them in their decision making process.

The FCC needs to have meaningful consultation with Indian nations, including the Tribe, to help explain the proposed rules and the technological advances that are driving the proposals. At this point, the Tribe is unclear what exactly wireless industry and the FCC mean by “small cell” or “5G” deployment. The definitions provided by the wireless industry seem to vary depending on the audience and the proposed undertaking. The FCC definitions are more consistent but do not match completely any of the definitions given by industry. Unless there is a common, consistent definition, miscommunication and resulting frustrations will continue and will inevitably slow the approval process for small cell and 5G deployments.

The FCC’s Tower Construction Notification System (TCNS) has proven to be a very useful tool to track, monitor, and expedite the placement of cellular technology infrastructure. Over the past 10 years, we have worked with and developed quality relationships with the many consultants installing telecommunication infrastructure facilities, including cell tower siting, through the TCNS program. The Tribe provides prompt response to cell tower notifications. If and when any situations arise using the TCNS program, tribes have been able to promptly contact industry consultants and/or FCC staff to expedite resolutions. With the emerging 5G technology by the

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<sup>1</sup> *Accelerating Wireless Broadband Deployment by Removing Barriers to Infrastructure Investment, Revising the Historic Preservation Review Process for Wireless Facility Deployments*, Draft Notice of Proposed Rulemaking and Notice of Inquiry, FCC-CIRC1704-03, WT Docket Nos. 17-79, 15-180 (rel. March 30, 2017) at p 2.

<sup>2</sup> *Id.* at p. 10.

wireless telecommunications industry, the Tribe can see the benefits of modernizing the existing TCNS to meet our needs. The Tribe's initial comments are set forth below, although the Tribe may provide follow-up comments and comment on other proposals.

## **A. Streamlining State and Local Review**

### **1. "Deemed Granted" Remedy for Missing Shot Clock Deadlines**

The Tribe does not believe a "deemed granted"<sup>3</sup> remedy is necessary. We have always performed our cultural assessments in a timely manner and have never intentionally held up a project. While we can usually get our assessments completed within 60 days, there should be an avenue, if the parties are engaged and working together, to complete the project after that time, if the parties agree.

Wireless providers should give the tribes the complete package of necessary information as early as possible, prior to the shot clock starting to run. Adequate time needs to be given to complete any necessary surveys or reviews. Of the three options provided in paragraphs 9 through 14, the only option we believe would be helpful to the process is to change the rebuttable presumption—that the deadlines are reasonable—to an irrebuttable presumption for a failure to act within the timeframe. Finding a local government in non-compliance or deeming their authority to lapse at the expiration of the shot clock is unnecessary. Again, getting the complete package is essential for the starting of the shot clock, and the ability to complete the assessment, even after the shot clock expires, is necessary and reasonable.

### **2. Reasonable Period of Time to Act on Applications**

The Tribe agrees that some structures need more scrutiny than others. Taking things such as: height, proximity to other towers, whether the structure would be located in residential, commercial or industrial areas, whether the project is a collocation project, the size of the equipment, and other factors all contribute to concerns of a local government. Developing a time line that allows for more time for more complex projects seems reasonable.

## **B. Reexamining NHPA and NEPA Review**

### **1. Background**

The Tribe strongly believes that NHPA and NEPA review are essential for Indian tribes. Rather than looking at tribal involvement as simply paying them as contractors to do cultural assessment work, the FCC should be acknowledging the sovereignty of Indian tribes and the fact that tribes should have the authority to deny wireless companies and others from doing any kind of work in their territory. Tribes are not just contractors hired to do the cultural assessment work, they are governments looking out for the health and safety of their people and the protection of their lands and resources.

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<sup>3</sup> Id. at p. 4-8.

The Tribe does not currently charge fees to review documentation. If, after reviewing the initial documentation, Tribal technical staff believe that the proposed locations have potential to impact historic properties, we request archaeological and/or ethnographic reviews. Project proponents have contracted with both outside archaeologists and Tribal staff to complete archaeological reviews. The Tribe expects project proponents to contract with the Tribe to complete any needed ethnographic studies, as the Tribe is the only entity with the expertise to both identify ethnographic resources and evaluate their significance to the Tribal community.

The fees for these reviews cover the Tribe's actual costs for conducting the research, including professional staff time for research and reporting, honoraria for Tribal elders and informants, supplies, any travel expenses, and modest overhead applied to all contracts and grants. In FY 2017, the Tribe's indirect rate is set at 26.75%.

## **2. Updating Our Approach to the NHPA and NEPA**

### **a. Need for Action**

The Tribe does not demand payment for these study services up front. Instead, we negotiate contracts for individual studies and invoice accordingly. Some projects are more complex or in closer proximity to known archeological or ethnographically significant sites. Other sites may not need a thorough review. For example collocation projects may not be as invasive as building a structure from the ground up. However, we do monitor on-going maintenance and other activity, even if the equipment is installed on an existing structure.

As stated earlier, the existing TCNS has been working well for the Tribe. We are notified in most cases, in compliance with the NHPA, and we provide timely responses to the TCNS notification. Once communication is established, the Tribal staff keeps in regular contact with the applicant. The Tribe understands the need to keep the project on track, and we work hard and diligently to get our assessment work done in a timely manner. In our area, we have not had the problem of having multiple tribes claim interests in the area, nor have we experienced issues with our assessments being "cumbersome and costly." Applicants should not be able to circumvent these very necessary cultural assessments when they are making the decision to build the structure on tribal lands or within a site held sacred by the Tribe. These types of interactions are simply part of doing business in Indian country. For the FCC to ignore tribal concerns on their own homelands would be paternalistic and disrespectful.

Contrary to claims that cell towers rarely impact historic properties, the Tribe has identified numerous existing communication towers built on traditional cultural properties without consultation. Examples include Cottonwood Butte and Pilot Knob in Idaho. The Tribe has worked diligently with the wireless industry to mitigate for existing or replacement towers on traditional cultural properties such as Mason Butte (Talmaks) in Idaho and Steptoe Butte in Washington state or newly proposed towers, such as at Kamiak Butte in Washington state.

## **b. Process Reforms**

### **i. Tribal Fees**

This section misrepresents the reason tribes are involved in these processes. The tribes are involved because these structures are being built through tribal lands and across tribal sacred sites. Yes, tribes should be paid fees for the work they perform on cultural assessments, but the FCC should focus on ensuring that tribes are in a position to authorize or not authorize a particular project, rather than on whether costs are consistent.

### **ii. Other NHPA Process Issues**

The Tribe strongly opposes any effort to allow applicants to “self-certify their compliance with Section 106.”<sup>4</sup> The FCC staff notes within this document that “on numerous occasions that applicants have failed to perform their Tribal notifications as our processes require.”<sup>5</sup> Because of this issue, we believe that the FCC needs to have oversight over the Section 106 process for applicants.

## **c. NHPA Exclusions for Small Facilities**

### **i. Pole Replacements**

The Tribe believes that notification is necessary whenever a business will be replacing their poles within their homelands. If the construction and excavation expands the boundaries of the original site at all, the replacement tower project must go through the NEPA process.

### **ii. Rights-of-Way**

Likewise, the Tribe does not agree that expansion of a right-of-way should be excluded from the NHPA process, if the right-of-way is expanded in any way. This document uses the phrase “the current right of way exclusion applies only if (1) the construction does not involve a substantial increase in size over nearby structures...”<sup>6</sup> This phrase is too general. What does “substantial” mean? And, what does “nearby” mean? Ignoring the historic property aspects of the area would be ignoring the government-to-government obligation of the federal government to consult with tribes on such projects.

### **iii. Collocations**

The purpose of the requirement of a Section 106 review for projects within 250 feet of the boundary of a historic district is that many of the sacred sites chosen by applicants are located on the highest geographical landmark in a particular area. These landmarks are significant to Indian tribes and have been significant for thousands of years. When additional equipment is being attached to these towers, tribes in the area should be notified and have adequate time to comment

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<sup>4</sup> Id. at p. 22.

<sup>5</sup> Id.

<sup>6</sup> Id. at p. 24.

on this action. The Tribe is troubled that the tribal assessments seem to be the target of these proposed rules. We strongly urge the FCC to consult with tribes individually before adopting any new rules that would limit their role.

#### **d. Scope and Undertaking and Action**

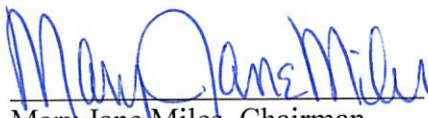
The Tribe strongly supports the FCC's continued role in ensuring environmental compliance on all of these proposed projects. We do not believe that site specific licenses should be distinguished from geographic area licenses.

### **3. Collocations on Twilight Towers**

The Tribe does not believe that twilight tower owners/renters should be given a free pass when there has been no determination of adverse effects. The phrase "streamlined process"<sup>7</sup> seems to be targeted at tribal cultural review, so we do not believe any streamlined process should be developed without consultation and careful consideration by Indian tribes.

## **CONCLUSION**

We urge the FCC to conduct government-go-government consultation with all tribes that may be impacted by this effort to streamline the cell tower infrastructure process. The Tribe reserves the right to submit additional comments as necessary.



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04-11-17  
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Date

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<sup>7</sup> Id. at p. 28.